IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	**MDL NO. 2724** **16-MD-2724** **HON. CYNTHIA M. RUFE**
THIS DOCUMENT RELATES TO: ***ALL ACTIONS***	

DEFENDANTS' JOINT SURREPLY BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL ON GLOBAL ISSUES

Defendants[1] respectfully submit this surreply brief to correct the erroneous arguments in Plaintiffs' reply brief. Plaintiffs cast aside proportionality, urging that the purported relevance of their requests is all that should matter. That is not the test. Defendants have proposed a practical and balanced approach to document discovery. In contrast, Plaintiffs' broad demands would add millions of dollars in costs but would add virtually nothing of relevance to the case beyond what Defendants have already offered.

First, Plaintiffs wrongly accuse Defendants of failing to address the allegations in Plaintiffs' various complaints. *See* Dkt. No. 761 at 2-3. Documents relevant to Plaintiffs' "overarching" conspiracy claims, to the extent any exist, would necessarily be encompassed in the discovery Defendants propose to provide. This will include documents reflecting any use of "fair share" in connection with the drugs actually at issue or otherwise relevant to assessing Plaintiffs' "overarching" claims. There is no basis for anything more at this stage in the litigation.

Second, Plaintiffs' theory of antitrust injury is a theory of overpayment for specific drugs during a specific time period, and the discovery Defendants propose to provide is consistent with that theory of injury. Plaintiffs point to no actual factual allegations in their pleadings justifying the overbroad discovery they demand covering products beyond those any Defendant actually sold and time periods unmoored from the relevant time periods for the price increases Plaintiffs

[1] The signatory Defendants to this brief are Apotex Corp. ("Apotex"); Aurobindo Pharma USA, Inc. ("Aurobindo); Citron Pharma LLC ("Citron"); Dr. Reddy's Laboratories, Inc. ("Dr. Reddy's"); Epic Pharma, LLC ("Epic"); Glenmark Pharmaceuticals Inc., USA ("Glenmark"); Lannett Company, Inc. ("Lannett"); Lupin Pharmaceuticals, Inc. ("Lupin"); Mayne Pharma Inc. ("Mayne"); Mutual Pharmaceutical Company, Inc. ("Mutual"); Mylan Inc., Mylan Pharmaceuticals Inc., and UDL Laboratories, Inc. ("Mylan"); Par Pharmaceutical Companies, Inc. and Par Pharmaceutical, Inc. ("Par"); Perrigo New York, Inc. ("Perrigo"); Sun Pharmaceutical Industries, Inc. ("Sun"); Taro Pharmaceuticals U.S.A., Inc. ("Taro"); and Zydus Pharmaceuticals (USA), Inc. ("Zydus").

claim caused them injury. They claim their pleadings allege that certain understandings arose "by at least 2011," but they do not identify a meeting, agreement, or other concrete action that merits discovery separate from the discovery Defendants already propose to provide. *See id*. at 3. Defendants will provide the discovery necessary to ascertain whether the alleged price increases Plaintiffs identify as potentially causing them injury were caused by collusion or non-collusive responses to economic realities, and that is all the discovery needed to fairly litigate the case. *See* Dkt. No. 744 at 9-11, 14, & 18.

Third, the Court's decision on the first group of motions to dismiss does not change the fact that Plaintiffs' requests are overly broad and unduly burdensome. *See* Dkt. No. 761 at 3-4. Defendants' discovery proposal responded to the allegations made regardless of whether the first round of motions to dismiss would be granted. That the Court found certain allegations sufficient to proceed does not define the bounds of what discovery is necessary to fairly litigate those allegations. As Defendants have explained, the discovery they propose to provide will cover all of the relevant issues in a much more cost-effective and substantially less burdensome way than Plaintiffs' overbroad demands.

Fourth, Plaintiffs quibble that Defendants' burden evidence is not sufficiently precise, but that misses the point. The declarations provided by Defendants illustrate the substantial increase in data volume—and thus in cost—likely to be associated with adopting Plaintiffs' definitions of the disputed terms. *See id*. at 6-7. Any uncertainty as to the exact burden Defendants would have to bear is due to the prematurity of Plaintiffs' motion. Indeed, despite the fact that Plaintiffs brought their motion well before search protocols or other prerequisites to a precise burden analysis were finalized, Defendants' declarations offer sufficiently concrete evidence that Plaintiffs' demands will substantially increase the burden of the discovery process. And because

the extra documents are unlikely to be additive in light of the immense discovery Defendants are already proposing to provide, Plaintiffs' demands are manifestly disproportionate to the needs of the case.

Fifth, Plaintiffs' examples of documents that allegedly would be "omitted" demonstrate why their demands are unjustified. Plaintiffs make the new claim in their reply brief that documents from Lupin regarding drugs other than Pravastatin might be relevant to proving Lupin's alleged participation in a conspiracy on Pravastatin. *See id*. at 4. But evidence regarding whether Lupin participated in a price-fixing conspiracy on Pravastatin will be fully disclosed by Lupin's search for discovery relevant to Pravastatin, and burdening Lupin with a wide-ranging review of irrelevant files will do nothing to prove or disprove the allegations against it. Similarly, for the examples Defendants have previously addressed (*see* Dkt. No. 744 at 7-9), Plaintiffs' rehashing of their speculations about communications that may not be captured has no merit. *See* Dkt. No. 761 at 8-10. To the extent that communications relevant to Plaintiffs' claims occurred, they would be encompassed by Defendants' proposals. Speculation about communications unmoored from the price increases Plaintiffs cited as giving rise to their alleged injuries simply represents an attempt to expand the case beyond the dispute actually at hand (i.e., whether Plaintiffs are entitled to compensation for certain specified price increases). *See id*. at 10-11. The Court should not allow such limitless expansion.

Sixth, Plaintiffs' attacks on Defendants' discovery proposal are misguided. *See id*. at 11-15. Defendants' proposal will necessarily include discovery on "overarching" issues, to the extent such material exists, because Defendants propose to produce discovery focused on the drugs that Plaintiffs have identified as potentially being impacted by overarching conspiracies. To the extent that this discovery points the way to additional issues or document categories that

require further development, the parties can efficiently address that at that point. But nothing in the Federal Rules supports Plaintiffs' attempt to invoke a catch phrase to erase all boundaries on discovery and, in turn, add millions of dollars in expense to the discovery process. Indeed, such a rule is unnecessary here because the bottom-line question of whether Plaintiffs can recover damages from Defendants for the price increases on the various accused products (to the extent a Plaintiff experienced a price increase at all) can be answered with the broad discovery Defendants propose to provide. Denial of Plaintiffs' motion will allow the parties to proceed promptly and efficiently to developing the factual record on the matters actually necessary to fairly litigate Plaintiffs' claims for relief, and Plaintiffs offer no good reason to believe that this approach would unduly delay the case.

Finally, the agreement of certain other Defendants to Plaintiffs' proposals does not make Plaintiffs' demands reasonable as to the objecting Defendants. *See id*. at 1. Plaintiffs offer nothing to suggest that the reasons those Defendants had to reach agreement with Plaintiffs apply to the objecting Defendants, and the question here is whether the burden imposed on the objecting Defendants is appropriate in light of the marginal (if any) relevance of the additional requested discovery, not whether certain other Defendants reached agreements that they viewed as acceptable in light of their particular circumstances in the course of complex and individualized negotiations.

For the foregoing additional reasons, Plaintiffs' Motion to Compel on Global Issues should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Chul Pak, certify that on this 3rd day of December, 2018, I caused DEFENDANTS' JOINT SURREPLY BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL ON GLOBAL ISSUES to be filed using the Court's ECF system thereby serving it electronically on all counsel of record.

Special Master David H. Marion and Special Discovery Master Bruce P. Merenstein were served via email.

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